
ANNUAL BENCH AND BAR CLE COURT OF APPEALS UPDATE

PRESENTED BY: JUDGE PAMELA R. GOODWINE

JUNE 25, 2019

2018-2019 KENTUCKY COURT OF APPEALS
ISSUES AND CASES OF INTEREST

TIPS AND TRICKS: WHAT NOT
TO DO!

- Emergency Relief – CR 76.36(4)
- Appealing CR 59.05 orders/
Raising new issues
- Dual petitions under KRS 199.502
and KRS 625.050
- Briefing rules

Summary of Cases

- *Brockman v. Brockman* – S.W.3d
– (Ky. App. 2019) (*DR pending*)
- *Doe v. Golden Walters, PLLC*, –
S.W.3d – (Ky. App. 2019).
- *Draper v. Trace Creek Girls’
Softball, Inc.*, 571 S.W.3d 103 (Ky.
App. 2018).
- *Koester v. Koester*, 589 S.W.3d
412 (Ky. App. 2019)

SEEKING EMERGENCY RELIEF UNDER CR 76.36(4) WHEN AN ORIGINAL ACTION IS FILED

- **DO NOT CALL 911 (COA)** under these circumstances. **THIS IS NOT AN EMERGENCY.**
- After filing an original action via a writ, petitioners sought an emergency order prohibiting enforcement of a circuit court order scheduling a jury trial for the following Monday: (1) because there were pending motions; and (2) they were not prepared for trial.
- CR 76.36(4) provides:
- If the petitioner requires any relief prior to the expiration of 20 days after the date of filing the petition he/she may move the court on notice for a temporary order on the ground that he/she will suffer immediate and irreparable injury before a hearing may be had on the petition.

APPEALING CR 59.05 ORDERS

- Often, litigants designate two orders for appeal: (1) the initial order affirming or denying; and (2) the subsequent order denying a CR 59.05 motion.
- Only the first order is subject to appellate review.
 - “Orders denying CR 59.05 relief are interlocutory. ie. non-final and non-appealable and cannot be made so by including the finality recitations.” *Hoffman v. Hoffman*, 500 S.W.3d 234, 236 (Ky. App. 2016).
 - “Unlike a ruling denying a motion for relief under CR 60.02, a ruling on a CR 59.05 motion is not a final or an appealable order. There is no authority in the rules to ask for reconsideration of a mere order which rules on a motion to reconsider a judgment.” *Id.*

RAISING NEW ISSUES

CR 59.05 motions and appeals

- “A motion to alter, amend, or vacate judgment cannot be used to raise arguments and introduce evidence that should have been presented during the proceedings before entry of judgment.” *Short v. City of Olive Hill*, 414 S.W.3d 433, 441, n. 7 (Ky. App. 2013).
- “Lately, many attorneys look at CR 59 motions as an all-you-can-eat-buffet, picking and choosing any argument they see fit to present on their plate to the court.” *Campbell v. Islam* 2019 WL 1870634 *4 (April 26, 2019).

DUAL PETITIONS under KRS 199.502 and KRS 625.050

- “By its nature adoption under KRS 199 vitiates parental rights of biological parents. KRS 199.520(2). When there is a dual petition involving an adoption and involuntary termination of parental rights, the adoption supersedes the termination because KRS 199 encompasses KRS 625. *E.K. v. T.A.*, – S.W.3d – (2019) (citing *Wright v. Howard*, 711 S.W.2d 492, 495 (Ky. App. 1986)).
- Ruling that when a court enters two judgments in an adoption case, the Court of Appeals shall view “the judgment of adoption’ and ‘order terminating parental rights’ as being one document that comprises the judgment.” *Id.*

COURT OF APPEALS' BRIEFING RULES

- *See Koester v. Koester*, 589 S.W.3d 412 (Ky. App. 2019).
- “Compliance with CR 76.12 is mandatory.” *Smothers v. Baptist Hosp. E.*, 468 S.W. 3d 878, 881-82 (Ky. App. 2015).
- CR 76.12(4)(c)(iv)
 - Litigants must cite or reference “specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.” *Koester*, 589 S,W.3d at 414.

SUMMARY OF CASES



Brockman v. Brockman S.W.3d – (2019) (Discretionary Review)

- Wife filed petition for dissolution. Circuit Judge entered divorce decree and made custody determination under the UCCJEA. Husband appealed.
- Court of Appeals held the Circuit Court in Kentucky had both personal and subject matter jurisdiction.
 - Personal: parties satisfied residency requirements of KRS 403.140(1)(a).
 - Subject matter: According to KRS 403.822(1)(a), no state could exercise jurisdiction of this case, therefore, under KRS 403.822(1)(b) Kentucky could hear this case because at least one parent had a “significant connection with this state other than mere physical presence.”

Doe v. Golden Walters, PLLC, – S.W.3d – (2019)

- Putative class members in civil rights actions filed in federal court against urban county government brought legal malpractice action against attorneys who had represented plaintiffs in the federal actions. On earlier appeal, 2009 WL 2408343, the Court of Appeals vacated the circuit court's order dismissing the claims, and remanded with instructions to reinstate the claims and hold in abeyance until they were ripe. Following the resolution of federal action, the attorney's motion for summary judgment was granted.

Draper v. Trace Creek Girls' Softball, Inc., 571 S.W.3d 103 (2018)

- A Softball player fractured her ankle sliding into second base and brought action against the city, which owned the field, on which she was playing, and the softball league. She alleged she sustained the injury because fixed, rather than break away bases, were used on the playing field. Player appealed after the Circuit Court granted the city's and league's summary judgment.
- Court of Appeals held that the Circuit Court correctly granted summary judgment.
 - Softball qualifies as a recreational activity under KRS 411.190.
 - Softball player did not pay a fee to enter the land, which would give rise to a higher standard of care.
 - The city did not owe a duty of care as a land owner for recreational activities.

How To Succeed at Appellate Advocacy! (Without Really Trying?) – By Judge Glenn E. Acree

- Included in your printed materials is a handout prepared and presented by Judge Glenn Acree in 2018. It contains tools to use for avoiding 34 potential pitfalls with appellate advocacy. It is an excellent guide to use for effective and efficient appellate practice. Remember that we have rules for a reason. It is important to incorporate and follow them when practicing before the Kentucky Court of Appeal.